MERONG MAHAWANGSA SDN BHD & ANOR v. DATO' SHAZRYL ESKAY ABDULLAH

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
AHMAD MAAROP FCJ
JEFFREY TAN FCJ
MOHAMED APANDI ALI FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 02(f)-29-03-2014(W)]
25 AUGUST 2015

CONTRACT: *Illegality and public policy – Whether provision of services illegal under Malaysian law – Claim for payment – Undertaking to use influence and good relationship with Government of Malaysia and Federal Ministers to secure tender of intergovernmental project – Whether letter of undertaking enforceable – Whether agreement to provide services to influence decision of public decision maker to award contract against public policy – Whether contractual consideration was lawful – Whether agreement void – Contracts Act 1950, s. 24(e)*

At the High Court, the respondent claimed for a sum of RM20 million, being the payment undertook by the appellant in a letter of undertaking for services rendered by the former in obtaining and securing the tender of the Johore-Singapore bridge project ('the bridge project'). According to the respondent, he had used his influence and good relationship with the Government of Malaysia to procure the bridge project for the benefit and interest of the first appellant. The respondent further particularised his dealings with Federal Ministers who he had close relationships with and the manner in which he exerted his influence and convinced those Federal Ministers. In defence, the first appellant submitted that the procurement of the bridge project on account of the respondent's close relationship with the Government of Malaysia and the Federal Ministers was against public policy and the letter of undertaking was illegal and void. The High Court held that the services rendered by the respondent were not opposed to public policy and that the letter of undertaking was enforceable against both the appellants. Among the issues brought forth during appeal at the Court of Appeal was whether it was the project and not the award that was withdrawn. The Court of Appeal opined that (i) the acknowledgment that the bridge project was awarded to the appellants through the endeavour of the respondent; (ii) the date of the letter of undertaking; and (iii) the date of payment, showed conclusively that the parties never intended to refer to the project itself. The Court of Appeal allowed the respondent's appeal and the appellants were ordered to pay the said RM20 million to the respondent. Hence, the present appeal. The issues that arose for the court's determination were (i) whether it was the award or contract that was withdrawn; and (ii) whether an agreement to provide

services to influence the decision of a public decision maker to award a contract was a contract opposed to public policy as defined under s. 24(e) of the Contracts Act 1950 ('the Act') and was therefore void.

Held (allowing appeal; setting aside orders of Court of Appeal)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) The award and the bridge project were intrinsically linked. There could not be one without the other. When the bridge project was withdrawn, the award on the bridge project was automatically retracted. It was so self-evident that the RM20 million was the consideration for the 'service' rendered to procure the bridge project and not just a document. When the bridge project was withdrawn, the RM20 million was not payable but if paid, the letter of undertaking provided that it should not be returned. (para 78)

(2) Section 24 of the Act stipulated five circumstances in which the consideration or object is unlawful, namely, where (a) it is forbidden by law; (b) it is of such nature that, if permitted, it would defeat any law; (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or (e) the court regards it as immoral or opposed to public policy. The considerations or objects referred to in paras (a), (b) and (e) of s. 24 shall be unlawful and the agreement which ensues shall be unlawful and void. (para 16)

(3) It was plain and obvious that the consideration was unlawful and the letter of undertaking was void. On that ground, the claim should have been dismissed. An agreement, the object of which is to use the influence with the Ministers of Government to obtain a favourable decision, is destructive of sound and good administration. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits. Such an agreement is contrary to public policy. It is immaterial if the persons intended to be influenced are not amenable to such recommendations. (para 77)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, responden menuntut RM20 juta, iaitu bayaran yang diakujanji dalam surat akujanji bagi perkhidmatan yang diberikan oleh responden dalam mendapatkan dan memperolehi tender projek jambatan Johor-Singapura ('projek jambatan'). Menurut responden, dia telah menggunakan pengaruh dan hubungan baiknya dengan Kerajaan Malaysia untuk mendapatkan projek jambatan bagi manfaat dan kepentingan perayu pertama. Responden seterusnya memperihalkan urusannya dengan Menteri-menteri Persekutuan yang mempunyai hubungan baik dengannya dan cara dia menggunakan pengaruhnya dan meyakinkan Menteri-menteri Persekutuan tersebut. Dalam pembelaannya, perayu pertama menghujahkan bahawa pemerolehan projek jambatan tersebut berdasarkan hubungan rapat

responden dengan Kerajaan Malaysia dan Menteri-menteri Persekutuan adalah bertentangan dengan polisi awam dan surat akujanji tidak sah dan terbatal. Mahkamah Tinggi memutuskan bahawa perkhidmatan yang diberikan oleh responden tidak bertentangan dengan polisi awam dan bahawa surat akujanji boleh dikuatkuasakan terhadap perayu-perayu. Antara isu-isu yang diutarakan semasa rayuan di Mahkamah Rayuan adalah sama ada projek dan bukan award yang ditarik balik. Mahkamah Rayuan berpendapat bahawa (i) pengakuan bahawa projek jambatan diawardkan kepada perayu-perayu melalui usaha responden; (ii) tarikh surat akujanji; dan (iii) tarikh pembayaran, secara muktamadnya menunjukkan bahawa pihak-pihak tidak pernah berniat untuk merujuk kepada projek tersebut. Mahkamah Rayuan membenarkan rayuan responden dan perayu-perayu diperintahkan membayar RM20 juta kepada responden. Oleh itu, rayuan ini. Isu-isu yang timbul bagi pemutusan mahkamah adalah (i) sama ada award atau kontrak yang ditarik balik; dan (ii) sama ada satu perjanjian untuk memberikan perkhidmatan untuk mempengaruhi keputusan pembuat keputusan awam untuk mengawardkan kontrak adalah satu kontrak yang bertentangan dengan polisi awam seperti yang ditakrifkan dalam s. 24(e) Akta Kontrak 1950 ('Akta') dan dengan itu, terbatal.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Rayuan)

Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Secara asasnya, award dan projek jambatan saling berkaitan. Tidak boleh wujud salah satu tanpa yang satu lagi. Apabila projek jambatan ditarik balik, award bagi projek jambatan tersebut secara automatiknya ditarik balik. Jelas bahawa RM20 juta adalah balasan bagi 'perkhidmatan' yang diberikan untuk mendapatkan projek jambatan dan bukan sekadar satu dokumen. Apabila projek jambatan ditarik balik, RM20 juta tidak perlu dibayar tetapi sekiranya telah dibayar, surat akujanji memperuntukkan bahawa ia tidak sepatutnya dipulangkan.

(2) Seksyen 24 Akta memperuntukkan lima hal keadaan dalam mana satu-satu balasan atau objek tidak sah, iaitu dalam mana (a) ia dilarang oleh undang-undang; (b) ia mempunyai sifat, jika dibenarkan, akan menewaskan mana-mana undang-undang; (c) ia adalah satu penipuan; (d) ia melibatkan atau memberi bayangan kecederaan kepada orang atau hartanah orang lain; atau (e) mahkamah menganggap ia tidak bermoral atau bertentangan dengan polisi awam. Balasan atau objek yang dirujuk dalam perenggan (a), (b) dan (e) s. 24 adalah tidak sah dan perjanjian yang menyusul daripadanya adalah tidak sah dan terbatal.

(3) Adalah jelas bahawa balasannya tidak sah dan bahawa surat akujanji terbatal. Atas alasan itu, tuntutan sepatutnya telah ditolak. Satu perjanjian, yang mana objeknya adalah menggunakan pengaruh Menteri-menteri Kerajaan untuk mendapatkan keputusan yang berpihak

kepadanya, memusnahkan pentadbiran yang wajar dan baik. Ia menunjukkan kecenderungan untuk merasuah atau mempengaruhi penjawat-penjawat awam untuk memberi keputusan berpihak kepada mereka selain daripada berdasarkan merit mereka sendiri. Perjanjian sedemikian bertentangan dengan polisi awam. Ia tidak penting sekiranya orang-orang yang ingin dipengaruhi tidak bersetuju dengan cadangan sedemikian.

Case(s) referred to:

Ahmad Zaini Japar v. TL Offshore Sdn Bhd [2002] 5 CLJ 201 HC ***(refd)***
Brett Andrew MacNamara v. Kam Lee Kuan [2008] 7 CLJ 625 HC ***(refd)***
China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd [2014] 7 CLJ 644 CA ***(refd)***
Chong Kow v. Kesavan Govindasamy [2009] 8 MLJ 41 ***(refd)***
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***
Cope v. Rowlands [1836] 2 M&W 149 ***(refd)***
Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21 FC ***(refd)***
David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***
Edler v. Auerbach [1949] 2 All ER 692 ***(refd)***
Elliot v. Richardson [1870] 5 LR 744 ***(refd)***
Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors And Another Appeal [2000] 3 CLJ 341 CA ***(refd)***
Gilbert and Murray [1994] CPSSRB ***(refd)***
Holman v. Johnson [1775-1802] All ER Rep 98 ***(refd)***
Hopkins v. Prescott [1847] 4 CB 578 ***(refd)***
Hounga v. Allen & Anor [2014] UKSC 47 ***(refd)***
Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***
Law Society of Saskatchewan v. Robertson Stromberg [1996] SJ No 30 ***(refd)***
Lediaev v. Vallen [2009] EWCA Civ 156 ***(refd)***
Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(refd)***
Lemenda Trading Co Ltd v. African Middle East Petroleum Co Ltd [1988] QB 448 ***(refd)***
Les Laboratoires Servier & Anor v. Apotex Inc & Ors [2014] UKSC 55 ***(refd)***
Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***
Lipton v. Powell [1921] 2 KB 51 ***(refd)***
Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd [1970] 1 LNS 68 FC ***(refd)***
Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
MAA Holdings Sdn Bhd & Anor v. Ng Siew Wah & Ors [1984] 1 LNS 144 HC ***(refd)***
Marles v. Philip Trant & Sons Ltd (Mackinnon, Third Party) (No 1) [1953] 1 All ER 645 ***(refd)***
Marlwood Commercial Inc v. Kozeny and Others; Omega Group Holdings Ltd and Others v. Kozeny and Others [2006] EWHC 872 ***(refd)***
Montefiore v. Menday Motor Components Company Ltd [1918] 2 KB 241 ***(refd)***
Mustafa Osman v. Lee Chua [1996] 3 CLJ 494 CA ***(refd)***
Natha Singh v. Syed Abdul Rahman & Anor [1962] 1 LNS 105 HC ***(refd)***
Norman v. Cole [1800] 3 Esp 253 ***(refd)***
North Western Salt Co Ltd v. Electrolytic Alkali Co Ltd [1914] AC 461 ***(refd)***

Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(refd)***
R v. Cleary [1992] NSJ No 355 ***(refd)***
R v. O'Brien [2009] OJ No 5817 ***(refd)***
R v. V [2008] EWHC 1531 (Comm) ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Scott v. Brown, Doering, McNab & Co [1892] 2 QB 724 ***(refd)***
Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd [2014] 3 CLJ 141 FC ***(refd)***
Tekron Resources Ltd v. Guinea Investment Co Ltd [2003] EWHC 2577 (QB) ***(dist)***
Vita Food Products Inc v. Unus Shipping Co Ltd (in Liquidation) [1939] 1 All ER 513 ***(refd)***
Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd & Ors [1999] 3 All ER 864 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 2(d), 2(e), 24(a), (b), (e), 25
Rules of the High Court 1980, O. 18 r. 8(1)

Criminal Code [Can], s. 121(1)(d)
Criminal Code [Guinea], art. 195

Other source(s) referred to:
Chitty on Contracts, 25th edn, para 1034, p 548
Mulla Indian Contract and Specific Relief Acts, 13th edn, vol 1, pp 702-703
NS Bindhra Interpretation of Statutes, 10th edn, pp 121-125

For the appellants - Firoz Hussein Ahmad Jamaluddin (Ahmad Al-Hady Abdul Razak, Stanley KW Chang, CH Loh & SC Tay); M/s Stanley Chang & Partners
For the respondent - CV Prabhakaran (Michael Teo Song Seng, Teoh Ai Bin, Shariza Ashari & CW Loh with him); M/s AB Teoh & Shariza

Reported by Najib Tamby

JUDGMENT

Jeffrey Tan FCJ:

[1] The question upon which leave was granted to appeal against the order of the Court of Appeal in respect of the matter decided by the High Court in the exercise of its original jurisdiction, reads:

> Whether an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under section 24(e) of the Contracts Act 1950 and [is] therefore void?.

[2] The background facts could be summarised as follows. Evidently, there was a plan by the Government of Malaysia for a bridge to replace the Johore-Singapore causeway (hereinafter referred to as the bridge project), and that the Economic Planning Unit of the Prime Minister's Department, by its letter dated 25 June 1998, awarded, in principle, the execution of the bridge project to one Suria Kalbu Sdn Bhd in which the second appellant had an equity of 60%. Hitherto, the appellants had requested the respondent "to render his services to procure and secure the award" of the execution of the

project from the Government of Malaysia", for which services the appellants had agreed to pay RM20 million to the respondent. Those "facts" appeared in the following letter of undertaking dated 3 July 1998 of the first appellant to the respondent, which was countersigned by the respondent in an agreement.

Letter Of Undertaking

To:

Mr. Shazryl Eskay bin Abdullah
I.C. 600216-02-5215

22 Jalan Bruas
Damansara Heights
50490 Kuala Lumpur

WHEREAS the Procuror has at our request agreed to render his services for the purpose of procuring and securing from the Government of Malaysia the award of the project known as "Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan" (hereinafter referred to as the "Project") in favour of the Consortium called SURIA KALBU SDN BHD OF No. 3, Jalan 222, 46000 Petaling Jaya (Company Registration No. 452586-U) (hereinafter called the "Consortium") of which we have a 60% equity participation in the issued share capital.

WHEREAS through the Procuror's services aforesaid the Unit Perancang Ekonomi Jabatan Perdana Menteri by letter dated 22th June 1998 has awarded in principle the project to the consortium.

In consideration of the services aforesaid rendered by the Procuror we Merong Mahawangsa Sdn Bhd (Company Registration No. 463227-X) a company incorporated in Malaysia and having its registered address at No. 3372, Jalan 18/31, Taman Sri Serdang, 43300 Seri Kembangan, Selangor Darul Ehsan hereby undertakes and agrees to pay you sum of Ringgit Malaysia Twenty Million only (RM20,000,000.00) being the agreed remuneration payable on or before 3rd November, 1998.

This undertaking shall remain valid so long as the award for the project remains valid and subsisting and should the award be withdrawn and or terminated for any reasons whatsoever the aforesaid sum of RM20,000,000.00 or any part thereof shall be refunded without interest immediately.

Dated this 3rd day of July 1998

sgd

…

Yahya bin A. Jalil
Pengarah Eksekutif
Merong Mahawangsa Sdn Bhd

I confirm my agreement to
the Undertaking aforesaid

sgd

...

Syazryl Eskay bin Abdullah

[3] The action by the respondent was for payment of that RM20 million by the appellants. The respondent pleaded that he rendered the following services to the appellants: (i) obtained the tender and secured the bridge project from the Government of Malaysia for the benefit and interest of the first appellant, (ii) elevated the second appellant's equity in Suria Kalbur Sdn Bhd from 20% to 60%, (iii) obtained foreign funding to fund the bridge project, and, (iv) "used his influence and good relationship with the Government of Malaysia to procure the original bridge project (SIG project) for the benefit and interest of the (first appellant)" (see 22AR). The respondent further pleaded that in consideration of his valuable services rendered, the first appellant, through the second appellant, gave the aforesaid letter of undertaking dated 3 July 1998, whereby the first appellant undertook to pay RM20 million to the respondent by or before 3 November 1998, but failed to honour the undertaking.

[4] The pleaded defence of the first appellant was two pronged. First, the first appellant pleaded that the asserted procurement of the bridge project on account of the respondent's close relationship with the Government of Malaysia and Dato' Seri Megat Junid was against public policy and that the said letter of undertaking was illegal and void. Then again, the first appellant also pleaded that the respondent had not secured any project from the Government of Malaysia for the first appellant, that on 11 August 2003, the bridge project, which was redesigned, was awarded to one Gerbang Perdana Sdn Bhd, that on 12 April 2006, the Government of Malaysia wholly scrapped the bridge project, and that the letter of undertaking could not be put into effect as the bridge project had not materialised. Suffice it to say that the pleaded defence of the second appellant was not materially different from that of the first appellant. The pleaded reply of the respondent was that the letter of undertaking was not contrary to public policy, that the bridge project was awarded to Gerbang Perdana Sdn Bhd on account of the endeavour of the respondent, and that the appellants had directly or indirectly enjoyed the benefit of the compensation that was paid pursuant to the cancellation of the bridge project.

[5] There were hardly any agreed facts to speak of when trial commenced (see p. 237 of the appeal record). But still much were admitted by both sides. *Inter alia*, the respondent admitted (see 239-242AR) (i) that on 11 August 2003, the Public Works Department issued a letter of acceptance to Gerbang Perdana Sdn Bhd for the design, construction, completion and commissioning of the (redesigned) bridge project for a contract sum of RM1.113 billion, (ii) that on 5 February 2003, the Public Works Department instructed Gerbang Perdana Sdn Bhd to stop work on the bridge

project, and, (iii) that on 12 April 2006, the Public Works Department "issued a letter to Gerbang Perdana for (the) mutual termination of the bridge project contract". And *inter alia*, the appellants admitted (see 243-245AR) (i) that "the letter of undertaking dated 3 July 1998 was signed by the second (appellant) on behalf of the first (appellant)", and, (ii) that with respect to the bridge project, a joint venture and shareholders agreement dated 11 November 1998 was entered into between the first appellant, Diversified Resources Berhad, Detik Nagasari Sdn Bhd and Gerbang Perdana Sdn Bhd. There were differences in the respective dates, but it was nonetheless common ground that the letter of undertaking dated 3 July 1998 was given by the appellants to the respondent, and that the bridge project was scrapped by the Government of Malaysia.

[6] The trial court held that "the main legal issue raised (by the appellants) was whether the consideration … was opposed to public policy, illegal and therefore unenforceable pursuant to s. 24(e) of the Contracts Act 1950" (Act), which said s. 24 of the Act reads:

> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.
>
> ILLUSTRATIONS
>
> (a) A agrees to sell his house to B for RM10,000. Here, B's promise to pay the sum of RM10,000 is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the RM10,000. These are lawful considerations.
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> (b) A promises to pay B RM1,000 at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.
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> (c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.
>
> (d) A promises to maintain B's child, and B promises to pay A RM1,000 yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay RM1,000 to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under a written law, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's advocate, promises to exercise his influence, as such, with B in favour of C, and C promises to pay RM1,000 to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Penal Code.

[7] At p. 13 of its grounds of judgment (see 32AR), the trial court held that it would not be necessary to consider the other pleaded defences of the appellants if it were to be held that "the consideration … was opposed to public policy, illegal and consequently, unenforceable as being void …".

[8] And in relation to the issue of whether the consideration was opposed to public policy, the trial court held:

> This court is of the considered view that the defendant had not produced any evidence in support of their assertion that the nature of the services rendered by the plaintiff has a tendency to be injurious to the public welfare or interest and what is that nature of the injury that has been inflicted on the general public. The bare assertion on the defendants' behalf that the nature of services rendered by the plaintiff for which the defendants had agreed to pay the remuneration of RM20,000,000.00 is opposed to public policy pursuant to section 24(e) of the Contracts Act 1950 is insufficient and cannot be sustained on the facts and surrounding circumstances (see *Theresa Chong v. Kin Khoon & Co* [1976] 2 MLJ 253 at 255-256, *Pua Kim Seng v. Mohamed Khashim bin Abdul Sakor & Anor* [2010] 5 MLJ 791 at 801, *Brett Hendrew Marchanara v. Lam Lee Kuan* [2008] 2 MLJ 450 at 463).

A …

On the facts and circumstances in the present case, this court is unable to regard the nature of the plaintiff's services rendered as incontestably and in any way inimical or opposed public interest (see *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 2 MLJ 621 at 669, *David Wong Hon Leong v. Noorazman bin Adnan* [1995] 4 CLJ 155, *Ahmad Zaini Japar v. TL Offshore Sdn Bhd* [2002] 5 CLJ 201, *Visu Sinnadurai* (3rd Edition).

B …

However, on the facts and surrounding circumstances in the present case, this court is unable on the face of it, to regard the services or consideration as opposed to public policy. This court finds the services rendered by the plaintiff are not opposed to public policy. This court finds the services rendered by the plaintiff are not for an unlawful purposes or to achieve an unlawful end. Neither is it tainted with illegality as the bridge project if it had proceeded would have been for the public good, use and benefit.

C

D **[9]** The trial court also gave or rather repeated the following reasons (see 46 – 56AR) for its finding that the 'services' rendered by the respondent was not opposed to public policy: (i) mere close relationship with Government leaders and assistance rendered to procure the project through the influence of the (respondent) are not *per se* opposed to public policy unless the consideration and object is inimical or tainted with illegality as envisaged by s. 24(e), (ii) the services were rendered in a transparent fashion, (iii) the object of the (respondent) and or the consideration were not tainted with illegality and or opposed to public policy, (iv) the court would not reject the (respondent's) claim solely on a bare assertion that the letter of undertaking was opposed to public policy, (v) to carry out its obligations, the (respondent) had not used any illegal means that were harmful to public welfare, (vi) there was no evidence of any abuse of influence, any influence peddling, any corrupt practice, any corrupt gratification to Governmental officials or Ministers, (vii) there was no evidence that the (respondent) was being used as an intermediary to tout for the applicants of government contracts, (viii) there were insufficient facts for a finding that the payment of RM20 million was opposed to public policy and or public welfare and interest, and (ix) the bridge project was for the good of the people.

E

F

G

[10] On the effect of s. 24(e), the trial court held that a contract would not be enforced "only if the court regard the consideration or object as illegal, as being opposed to public policy", and that "until the court regard the consideration or object as unlawful and void, the presumption must necessarily be that the consideration or the object is lawful and the contract is enforceable unless and until it is rebutted" (see p. 60AR).

H

I **[11]** At the end of a lengthy discourse on s. 24(e) of the Act which made up more than the greater part of its grounds, the trial court held that the letter of undertaking was enforceable against both appellants. But then against the

grain of that latter finding, the trial court concluded, in just a matter of a few short paragraphs (see 70-72AR), that the bridge project was withdrawn or terminated and "did not materialise", and that, pursuant to terms of the letter of undertaking, the respondent was not entitled to payment.

[12] The trial court rejected the argument that it was the project and not the award that was withdrawn.

[13] But that argument that there was a difference between "award" and "project" was wholly accepted by the Court of Appeal which held:

> We have no doubt that the (Respondent's) claim must succeed for the simple reason that (the letter of undertaking) refers to the award of the project as opposed to project itself. Clause 4 specifically states that the letter of undertaking shall remain valid as long as the 'award for the project' remains valid and subsisting. It is our view that there is a world of difference between the 'award of the project' and the 'project' itself.
>
> Here it is undisputed at no time was the award of the project terminated or withdrawn by the Government. In fact, learned counsel for the (Appellants) in his submission confirm this but argued that the letter of undertaking became invalid when the Government terminated the by then 'crooked bridge project' in 2006. His contention was accepted by the learned trial judge and with respect we agree to that contention as it would mean that the Court will be reading something which does not appear within the four corners of the letter of undertaking. (see 82AR).

[14] In the opinion of the Court of Appeal, the following particulars in the letter of undertaking, namely, (i) the acknowledgement that the bridge project was awarded to the appellants through the endeavour of the respondent, (ii) the date of the letter of undertaking being 3 July 1998, and, (iii) the date for payment of the said RM20 million being 3 November 1998, "show conclusively that the parties never intended to refer to the project itself. If they did they would not have specified the payment date a mere four months from the date of the letter of undertaking. In any event, if their intention was to refer to the project itself then that could have been achieved by employment of the following words – 'this letter of undertaking shall become invalid if and when the project is terminated for whatever reason' "(see 83AR). The final remark of the Court of Appeal was that "the learned judge erred when he took into account the 2006 termination. On that note, the Court of Appeal allowed the appeal and accordingly ordered the appellants to pay the said RM20 million to the respondent.

[15] Whether s. 24(e) of the Act was raised in argument at the intermediate appeal was not revealed in the grounds of judgment of the Court of Appeal. But given that s. 24(e) of the Act was an issue at the trial court and is the heart and soul of the leave question, it is only apt to set out the law relating to s. 24 of the Act which is the codification of the common law (see *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 LNS 21; [1983] 2 MLJ 196 per Lee Hun Hoe CJ (Borneo), delivering the judgment of the court).

[16] Section 24 of the Act stipulates five circumstances in which the consideration or object is unlawful, namely, where (a) it is forbidden by a law; (b) it is of such a nature that, if permitted, it would defeat any law; (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or, (e) the court regards it as immoral, or opposed to public policy. "In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void … The provisions of s. 24 of our Contracts Act 1950 referred to earlier are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paras (a), (b) and (e) of s. 24 shall be unlawful and the agreement which ensues shall be unlawful and void. Paragraph (a) deals with what is forbidden or prohibited by law; para (b) deals with what could defeat the object of any law; and para (e) deals with public policy" (*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; [1990] 1 MLJ 356 per Hashim Yeop Sani CJ (Malaya), delivering the judgment of the court), which statements "continue to be good law" (*Fusing Construction Sdn Bhd v. EON Finance Bhd & Ors And Another Appeal* [2000] 3 CLJ 341; [2000] 3 MLJ 95, 105 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). "… consideration is unlawful if it is forbidden by law, or is of such a nature that, if permitted, would defeat the provisions of any law or is immoral or opposed to public policy. Unlawful consideration is a defence against the plaintiff. Consideration opposed to public policy is illegal, and contracts founded on them are condemned by law. An agreement to be at variance with public interest it is said, must be clearly and indubitably in contravention of public policy (*Chong Kow v. Kesavan Govindasamy* [2009] 8 MLJ 41, Mohd Ghazali J, as he then was).

[17] The classic statement was made by Lord Mansfield CJ (Aston, Willes and Ashurst JJ concurred) in *Holman v. Johnson* [1775-1802] All ER Rep 98:

> The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*

[18] That statement of Lord Mansfield has apparently withstood the test of time. In *Hounga v. Allen and Another* [2014] UKSC 47, the English Supreme Court Lord Hughes said (with whom Lord Carnwath agreed) that while Lord Mansfield's statement of law cannot be treated as a comprehensive test for the application of the law of illegality, yet one central feature remains true:

> Whilst Lord Mansfield's early statement of the law in *Holman v. Johnson* [1775] 1 Cowp 341, 98 Eng Rep 1120 cannot be treated as a comprehensive test for the application of the law of illegality, it is important to remember one central feature of it, which remains true. When a court is considering whether illegality bars a civil claim, it is essentially focussing on the position of the claimant *vis-à-vis* the court from which she seeks relief. It is not primarily focusing on the relative merits of the claimant and the defendant. It is in the nature of illegality that, when it succeeds as a bar to a claim, the defendant is the unworthy beneficiary of an undeserved windfall. But this is not because the defendant has the merits on his side; it is because the law cannot support the claimant's claim to relief.

[19] "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common law or statute, no court will lend its assistance to give effect" (*Cope v. Rowlands* [1836] 2 M&W 149, 157 per Parke B, which was quoted with approval in *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 CLJ 141; [2014] 3 MLJ 301 per Ramly Ali FCJ, delivering the judgment of the court). "Under s. 2(g) of the Contracts Act, an unlawful agreement is not enforceable" (*Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81 per Edgar Joseph Jr FCJ, delivering the judgment of the court).

[20] Even so, in *Lori v. Arab-Malaysian Finance*, this court counselled that courts should be slow to strike down commercial contracts on the ground of illegality, contrary to the view expressed in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd*:

> We therefore heartily agree with the Court in *Chung Khiaw Bank* that the development of the Common Law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. But, having said that, we consider that the trend shown by the courts in Common Law countries to be slow in striking down commercial contracts on the ground of illegality is a sensible one, which we should follow thus incorporating it as part of our Common Law.
>
> Indeed, twenty years ago, this is precisely what Raja Azlan Shah CJ (now HRH the Sultan of Perak) had done in *Central Securities (Holdings) Bhd v. Haron bin Mohamed Zaid* [1979] 2 MLJ 144. Here is what His Lordship said (at p 247), when speaking for the old Federal Court:

> We bear in mind the much quoted and common sense warning by Devlin J in *St John Shipping Corp v. Joseph Rank Ltd* [1956] 3 All ER 683 at pp 690-691) against a too ready assumption of illegality or invalidity of contracts when dealing with statutes regulating commercial transactions.
>
> We would observe that two points are noteworthy about the *Central Securities* case; first, the dispute there arose out of a sale and purchase transaction of shares an event which occurred on 12 March 1975; in other words, long after the critical date of 7 April 1956 referred to in the Civil Law Act, yet we find Raja Azlan Shah CJ applying the Common Law trend in England and, second, the *Central Securities* case was not referred to by the Court in *Chung Khiaw Bank*.

[21] On pleadings, O. 18 r. 8(1) of the Rules of the High Court 1980 (since replaced by the Rules of Court 2012) required illegality to be pleaded. But the overriding consideration is legality and not pleading. That was settled long ago.

[22] In *Scott v. Brown, Doering, McNab & Co* [1892] 2 QB 724, 728, Lindley LJ enunciated that no court ought to enforce an illegal contract, even if illegality were not pleaded:

> … no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of Lord Mansfield in *Holman v. Johnson* [1775] 1 Cowp 341; [1775-1882] All ER Rep 981.
>
> (the above passage was cited with approval in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang* and in *Sigma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 per Raja Azlan Shah Ag CJ (Malaya), as HRH then was, delivering the judgment of the court).

[23] In *Lipton v. Powell* [1921] 2 KB 51, 58, Lush J added that the court may refuse to enforce a contract, which although *ex facie* legal, but where its illegality appears:

> One of these cases is that in which the contract *ex facie* shows illegality … In a case of that kind the Court is entitled and indeed bound to intervene and refuse to enforce the contract, because "No Court ought to enforce an illegal contract … if the illegality is duly brought to the notice of the Court"; per Lindley LJ in *Scott v. Brown Doerning McNab & Co* [1892] 2 QB 724, 728, adopted by Cozens-Hardy MR in *In re Robinson's Settlement* [1912] 1 Ch 717, 725.

> The other case in which the judge may refuse to enforce the contract is that in which, although *ex facie* the contract is legal, yet in the course of the proceedings an admission is made or evidence is given by which its illegality clearly appears. If, for example, in an action like the present the plaintiff were to admit that he was unregistered, or the defendant were to give evidence that the plaintiff was unregistered, the illegality would be brought to the notice of the Court, and the Court would refuse to enforce the contract just as if the illegality had appeared upon the face of the contract.

[24] Where a transaction is not on its face manifestly illegal, the ordinary rule applies that only evidence relevant to a pleaded allegation is admissible. In *North Western Salt Co Ltd v. Electrolytic Alkali Co Ltd* [1914] AC 461, the court was faced with an argument as to illegality in circumstances where the point had not been taken, or not properly been taken before. *Viscount Haldane* stated where a transaction is not on its face manifestly illegal, the ordinary rule applies that only evidence relevant to a pleaded allegation is admissible.

> It is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleading so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated facts, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand if the action really rests on a contract which on the face of it ought not to enforced, then as I have already said, the Court ought to dismiss the claim irrespective of whether the pleadings of the defendant raised the question of illegality.

[25] Devlin J, in *Edler v. Auerbach* [1949] 2 All ER 692, said that *North Western Salt v. Electrolytic Alkali Company* authorised four propositions:

> That case authorises, I think, four propositions: first, that where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that where, as here, the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that where unpleaded facts, which, taken by themselves, show an illegal object, have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not. The last proposition is the most important for the purpose of this case and I think that it fairly synthesises the relevant *dicta*. The court must pronounce on

A the transaction if, in the words of *Viscount Haldane LC* ([1914] AC 469), the "case has been completely presented", or, in Lord Moulton's words (*ibid* 476): "the contract and its setting be fully before the court" … Where notice of the issue is not given on the pleadings, there is a danger that that assumption may break down, and the decision in *North-Western Salt Co Ltd v. Electrolytic Alkali Co Ltd* is a warning against overlooking that
B danger. In *Rawlings v. General Trading Co* ([1921] 1 KB 645), Scrutton LJ treated the decision as making it clear:

> … that where all the facts are before the court, and it can see clearly that it is contrary to public policy to enforce the agreement, the court should act, though the pleadings do not raise the point.
>
C (see also *Chitty on Contract* 30th Edition Volume 1 at paragraph 16-205).

[26] Therefore, "the question of illegality would not depend on pleading or procedure, or on who first might or should produce the documents. It would be a question of substance, of which, if necessary, the court would of its own
D motion take cognisance, and to which the court would give effect" (*Vita Food Products Inc v. Unus Shipping Co Ltd (in Liquidation)* [1939] 1 All ER 513 per Lord Wright). "… when an allegation of illegality is made, and a suggestion is made to the court that the contract is illegal, notwithstanding the fact that the illegality is not pleaded, the court is bound to take cognisance of the fact
E that the contract may be illegal, and, if it is illegal, the court cannot enforce it" (*Marles v. Philip Trant & Sons Ltd (Mackinnon, Third Party) (No 1)* [1953] 1 All ER 645 per Lynskey J). "A judge is constrained to decide those issues raised by the pleadings in an action. The judge cannot decide issues not contained in the pleading because the judge has jurisdiction only to deal with
F those matters that the parties have chosen to bring before him in their pleadings. This rule is subject to exceptions where there is a public interest and the judge on his own initiative considers a matter of which he has become aware during the course of a case, although it is not contained in the pleadings, for example, cases of illegality or of conduct contrary to public
G policy" (*Swann, Evans, Ferguson and Crawshay (a firm) v. Hill and Another,* Court of Appeal (Civil Division) per Roch LJ, 8 March 2000).

[27] Most recently, in *Les Laboratoires Servier & Anor v. Apotex Inc & Ors* [2014] UKSC 55, the Supreme Court of England per Lord Sumption (with whom Lord Neuberger and Lord Clarke agreed) affirmed that a judge is
H bound to take up the illegality defence:

> The illegality defence, when it arises, arises in the public interest, irrespective of the interest or rights of the parties. It is because the public has its own interest in conduct giving rise to the illegality defence that the judge may be bound to take the point of his own motion, contrary to the
I ordinary principle in adversarial litigation.

[28] Thus, "It is well established that if a contract is, on its face, illegal, the court will not enforce it, whether illegality is pleaded or not." *Lediaev v. Vallen* [2009] EWCA Civ 156 per Aikens LJ). Local authorities agreed.

[29] In *Natha Singh v. Syed Abdul Rahman & Anor* [1962] 1 LNS 105; [1962] 1 MLJ 265b, Hepworth J applied *North Western Salt v. Electrolytic Alkali Company and Lipton v. Powell,* and held that even where not pleaded the court has the right to intervene "where a contract is on the face of it illegal or its illegality is brought to the notice of the court".

[30] In *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115; [1962] MLJ 143, it was held by Lord Denning, delivering the judgment of the Board, "that once this disclosure (of a fraudulent purpose) was made … the courts were bound to take notice of it even though the son had not pleaded it, see *Scott v. Brown Doerning McNab & Co*".

[31] In *Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd* [1970] 1 LNS 68; [1971] 2 MLJ 161, the Federal Court per Ismail Khan CJ (Borneo) (Azmi LP and Yong J concurring) restated the principles:

> The point whether the court can take cognisance of a point of illegality, whether pleaded or not, has been the subject of numerous decisions. I need only refer to the case of *Snell v. Unity Finance Limited* [1963] 3 All ER 50 at p 55 where most of the authorities were dealt with. In that case Willmer LJ referred with approval to the propositions set out by Devlin J in *Edler v. Auerbach* [1949] 2 All ER 692 who, following the reference to *North-Western Salt Company Limited v. Electrolytic Alkali Company Limited* [1914-15] All ER Rep 752, said:
>
> > That case authorises, I think, four propositions: first, that where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, that where, as here, the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that where unpleaded facts, which, taken by themselves show an illegal object, have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.

[32] In *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457, Lord Oliver of Aylmerton stated:

> It is well established as a general principle that the illegality of an agreement sued upon is a matter of which the court is obliged, once it is apprised of facts tending to support the suggestion, to take notice

A *ex proprio motu* and even though not pleaded (see eg *Edler v. Auerbach* [1950] 1 KB 359) for clearly, no court could knowingly be party to the enforcement of an unlawful agreement.

[33] In *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173; [1992] 2 MLJ 281, the former Supreme Court per
B Peh Swee Chin, delivering the judgment of the court, said:

> Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage
C irrespective of whether illegality is pleaded or not where the contract is *ex facie* illegal.
>
> When the contract is not *ex facie* illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the court can still take judicial notice of illegality and refuse to enforce it. The situation is when facts which have not been pleaded emerge in evidence
D in the course of the trial showing clearly the illegality, eg the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances, see eg *Palaniappa Chettiar v. Arunasalam Chettiar* 1, *Leong Poh Chin v. Chin Thin Sin* 2, and *North Western Salt Co Ltd v. Electrolytic Alkali Ltd* 3 just to mention a few. The existence of such a
E situation in the instant appeal is warranted by the facts that emerged in evidence, including affidavit evidence.

[34] And in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520, the Court of Appeal per Gopal Sri Ram JCA, as he then was (VC George JCA, Abu Mansor JCA, as he then was, concurring) held that "the
F justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has broken the law should succeed" (see also *Mustafa Osman v. Lee Chua* [1996] 3 CLJ 494; [1996] 2 MLJ 141, where Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, affirmed "that illegality need not
G be specifically pleaded").

[35] Clearly, therefore, courts are bound at all stages to take notice of illegality, whether *ex facie* or which later appears, even though not pleaded, and to refuse to enforce the contract. In that regard, we endorse the following statement of law by the Court of Appeal per Hamid Sultan JCA, delivering
H the judgment of the court, in *China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd* [2014] 7 CLJ 644; [2014] 5 MLJ 1:

> At the outset we must say that the trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality … whether or not it is the pleaded case of the parties
I or whether the issue was raised during the trial. The case of *Blay v. Pollard & Morris* [1930] 1 KB 628 where Scrutton LJ observed:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.
>
> which has been followed in a number of local cases will not stand to tie the hands of judges to deal with the above issues, or arrest impropriety on its own motion at *limine* …

[36] On the illustrations of lawful and unlawful considerations, need it be said that illustrations are illustrations and are not the be-all and end-all of all lawful and or unlawful considerations. Illustrations are "examples of what would constitute lawful considerations and what would be considered unlawful and void" (*Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 1 per Abdul Malik Ishak JCA). "An illustration to a statutory provision merely illustrates a principle and *ex hypothesi* it cannot be exhaustive. It is illustrative of the true scope and ambit of a section. It must be read subject to the relevant provision in the section itself … Illustration merely illustrates a principle and what the court should try and do is to deduce the principle which underlies the illustrations. An illustration is a simple statement of facts to which the section itself has got to be applied. It only exemplifies the law as enacted in a statute ... The statement of law in the illustrations used in an Act cannot be taken as laying down substantive law, and does not bind the court to place a meaning on the section which is inconsistent with its language. If there be any conflict between the illustration and the main enactment, the illustration must give away to the latter. It is true that illustrations cannot control the language of a section, but they certainly afford a guidance to its construction. (*NS Bindhra Interpretation of Statutes*, (10th edn) at pp. 121-125).

[37] The focus of one of the two components of the leave question – "whether an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under s. 24(e) of the Contracts Act 1950 and [is] therefore void" – is on 'public policy' which was thus enunciated in the following.

[38] In *MAA Holdings Sdn Bhd & Anor v. Ng Siew Wah & Ors* [1984] 1 LNS 144; [1986] 1 MLJ 170, where reference was made to the following passage in *Chitty on Contracts* (25th edn) para. 1034 at p. 548, George J, as he then was, said that it ought to be recognised that certain cases would not fit clearly into the categories:

> Scope of public policy. Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups: first, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and, fifthly, objects economically against the public interest.

A *Chitty* itself recognises that certain cases do not fit clearly into any of these categories but here we need not have to be concerned with that. For the purposes of the instant case it can be said that the second and fifth of the said categories may be relevant.

[39] But that was a commentary on the scope of public policy under the B Common Law of England and not on the scope of public policy under the Act. Section 24 of the Act is a codification of the Common Law of England. But s. 24 of the Act was drafted after some fine tuning of the common law on which it was based. Under s. 24 of the Act, contracts fitting under s. 24(a) and 24(b) fall under those latter provisions, while contracts fitting under C 'public policy' fall under s. 24(e). That distinction was made in *Sababumi (Sandakan) v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151, where Peh Swee Chin FCJ said as follows:

Section 24 appears to me to have been drafted after some fine tuning of the common law on which it is based. At common law, contracts fitting D in with the said s. 24(a) and (b) for contravening any law would be illegal for being against public policy, but in our Contracts Act 1950, same contracts are covered by s. 24(a) and (b), ie under two separate subsections so that s. 24, which also refers to public policy elsewhere in the section, deals with other contracts against public policy such as, as we know, contracts which interfere with administration of justice, contracts in E restraint of trade and contracts other than in these two groups. Please see in this connection Lord Wright's observation in *Vita Food Products Inc v. Unus Shipping Co Ltd (In liquidation)* [1939] AC 277, about public policy being the basis for the non-enforceability of contracts rendered illegal by statutes.

F **[40]** Hence, under s. 24 of the Act, the scope of public policy as a ground to invalidate a contract should exclude the first of the groups stated in *Chitty on Contracts (supra).*

[41] In *Brett Andrew MacNamara v. Kam Lee Kuan* [2008] 7 CLJ 625; [2008] 2 MLJ 450, Balia Yusof J, as he then was, referred to the following passage G in Pollock and Mulla on *Indian Contract and Specific Relief Act*, 10th edn, on the meaning of 'public policy'.

Public Policy – The principle of public policy is this: *ex dolo molo non oritur* action. Lord Brougham defines public policy as the principle which declares that no man can lawfully do that which has a tendency to be H injurious to the public welfare.

[42] It should also be said that public policy is not static. "The question of whether a particular agreement is contrary to public policy is a question of law … It has been indicated that new heads of public policy will not be invented by the courts for the following reasons … However, the application I of any particular ground of public policy may vary from time to time and the courts will not shrink from properly applying the principle of an existing ground to any new case that may arise … The rule remains, but its application varies with the principles which for the time being guide public opinion" (*Halsbury's Law of England,* 5th edn, vol. 22 at para. 430).

[43] The second component of the leave question is "the provision of services for a consideration to influence the decision of a public decision maker to award a contract". It is crucial to recognise the 'service' for what it was.

[44] In *R v. O'Brien* [2009] OJ No. 5817, it was alleged that Larry O'Brien, the then Mayor of Ottawa, committed an offence contrary to s. 121(1)(d) of the Criminal Code of Canada which provided that "Every one commits an offence who having or pretending to have influence with the Government or with a Minister of the Government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection the transaction of business with or any matter of business relating to the Government or a claim against Her Majesty or any benefit that Her Majesty is authorised or is entitled to bestow, whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be". The Crown submitted "that the activity in issue in this case harms public confidence in the integrity of the public appointment process, a process that must be conducted in a fair, open and transparent manner". JD Cunningham ACJSCJ agreed.

> Section 121(1)(d) is clearly aimed at preventing influence peddling in order to protect the public's confidence in the integrity and appearance of integrity of the government. I agree with the Crown that read in this context, the components of this particular section prohibit trading those things for personal advantages by those either in a position to influence decisions or by pretending to have influence. In my view, if s. 121(1) is directed at preserving the appearance of government integrity, any offer of a benefit or advantage made by a person having or pretending to have influence with the government which, regardless of the nature of the benefit offered, would, from the perspective of an ordinary, reasonable member of society have the appearance of compromising the government's integrity, falls within the scope of s. 121(1)(d). The benefits or advantages referred to in this subsection are to be considered broadly in order to give it purpose.

[45] There is no provision for a similar offence in the local jurisdiction. But *R v. O'Brien* shows that the sort of activity as stated in the said s. 121(1)(d) was labelled as influence peddling. Indeed, in *R v. Cleary* [1992] NSJ No. 355, the court openly said that an offence under the said s. 121(1)(d) was influence peddling. Incidentally, in *Law Society of Saskatchewan v. Robertson Stromberg* [1996] SJ No. 30, and in *Gilbert and Murray* [1994] CPSSRB, it was held that s. 121 of the Criminal Code of Canada includes the offence commonly known as influence peddling.

[46] Canada is not the only jurisdiction to label that sort of activity as stated in the said s. 121(1)(d) as influence peddling. In *Tekron Resources Ltd v. Guinea Investment Co Ltd* [2003] EWHC 2577 (QB), the claimant had acted as an

A intermediary between a company and the Government of Guinea. The claimant claimed for fees allegedly due. The defendant argued, *inter alia*, that officers of the claimant had stated that they had a 'special relationship' with the Government of Guinea; that under the terms of the representative agreement, the claimant had agreed to use its influence and or relationship
B with the Government and/or officials to obtain for the defendant an interest in bauxite concessions in Guinea; that such an agreement was illegal by the law of Guinea; and/or that the agreement was void as being contrary to public policy under English law. Under art. 195 of the Guinean criminal law, it was an offence to procure official and/or governmental influence in
C exchange for payment. That article, which followed a provision of French law, read:

> Article 195: Any person who has solicited or accepted offers or promises, solicited or received gifts or presents in order to obtain or attempt to obtain decorations, medals, honours or rewards, positions, offices or
D employment or any favours granted by a public authority, contracts, undertakings or other benefits arising from agreements made with the public authority or government agency under the control of the State, or, generally, a favourable decision from such an authority or government agency and has thus abused a real or perceived influence, shall be punished by imprisonment of one to five years and the fine specified in
E the first paragraph of Article 192.

[47] Interestingly, the said art. 195 was headed 'Trafic d'influence', which the court said could be translated as 'Trafficking of Influence' or 'influence peddling'.

F **[48]** On 'influence peddling', learned counsel for the appellant submitted that "the modern formulation of the public policy rule against influence peddling could be traced to" *Montefiore v. Menday Motor Components Company Ltd* [1918] 2 KB 241, and, *Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd* [1988] QB 448.

G **[49]** In *Montefiore*, the plaintiff was a member of the Imperial Air Fleet Committee who held out to the defendant that he could assist the defendant in getting finance from the Air Board. In return he was to obtain 10% of the amount received and some shares. The plaintiff was 'to put in a good word for' the defendant. The Government in the autumn of 1916 advanced to the defendant 2500/. The defendant paid the plaintiff 100/. The defendant
H thought all the while that the plaintiff was working in his interests and helping him to get the money which the plaintiff afterwards obtained from the Government. The plaintiff based his claim upon the allegation that his introduction and services caused the advance of money to be given by the Government to the defendant.

I

[50] On the facts, Shearman J said that "the true consideration for the giving of the note was that the plaintiff should use his alleged position, and the value of his good word, in favour of the defendants in getting Government assistance in the form of money or contracts".

> I am satisfied, firstly, that the plaintiff never mentioned to anyone connected with or advising the Government departments dealing with aircraft construction the fact that he had a pecuniary interest in the success of the defendants obtaining Government assistance. He appears upon his own admission to have obtained something like a dozen commission notes from different firms who were engaged in the manufacture of aircraft; secondly, that what was bargained for between the plaintiffs and the defendants was the recommendation by the plaintiff of the merits of the defendants and the exercise of the influence of the plaintiff with servants of the Crown in order to induce an advance of public money to the defendants for the securing or the obtaining of Government contracts. The true consideration for the giving of the note was that the plaintiff should use his alleged position, and the value of his good word, in favour of the defendants in getting Government assistance in the form of money or contracts.

[51] Shearman J then pronounced that it was contrary to public policy that a person should be hired for money or valuable consideration, when he had access to persons of influence, to use his position and interest to procure a benefit from the Government.

> I do not propose to decide the question whether the plaintiff was the effective cause of the capital being found for the defendants by the Government. In my judgment the contract sued upon is illegal and void as contrary to public policy. It is well settled that "when it is apparent on the face of a contract that it is unlawful, it is the duty of the judge himself to take the objection, and that, too, whether the parties take or waive the objection …
>
> A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. In my judgment it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government. This was expressly decided by Lord Eldon in *Norman v. Cole* (4) when he said: "I cannot suffer this cause to proceed. I am of opinion this action is not maintainable; where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money: the doing an act of that description should proceed from pure motives, not from pecuniary ones." So long ago as the reign of Edward VI. it was provided by the statute of 5 & 6 Edw. 6, c. 16, that it was illegal to bargain for any brokerage or money for the transference of an office, or any part of an office, concerning the receipt, controlment, or payment of any money or revenue of the Crown. And a later statute, 49 Geo. 3, c. 126, made it a misdemeanour to receive money for any office, place, or employment particularly specified in that Act. While I do not go to the

A length of holding that the defendants were bargaining with the plaintiff that they should receive an office under the Crown, I agree with the remarks of Coltman J. in the case of *Hopkins v. Prescott* (5) that where a person undertakes for money to use his influence with the Commissioners of Taxes to procure for another party the right to sell stamps, & c., if the contract were not void by statute, it would be void
B at common law as contrary to public policy. It is well settled that in judging this question one has to look at the tendency of the acts contemplated by the contract to see whether they tend to be injurious to the public interest. In my judgment a contract of the kind has a most pernicious tendency. At a time when public money is being advanced, to private firms for objects of national safety it would tend to corrupt the public service
C and to bring into existence a class of persons somewhat like those who in ancient times of corrupt polities were described as "carryers," men who undertook for money to get titles and honours for those who agreed to pay them for their influence: see the remarks of Lord St. Leonards in *Egerton v. Earl Brownlow.* (1)

D **[52]** In *Lemenda*, the defendants, a company registered in London, entered into a contract with the Qatar national oil company for the supply of crude oil. Under the law of Qatar a commission contract for the supply of oil by the national oil company was void and unenforceable, because it was contrary to Qatar public policy. The defendants later entered into an
E agreement with the plaintiffs, a company registered in Nassau, under which the plaintiffs agreed to assist the defendants in procuring the renewal of the supply contract by exerting influence on the chairman or managing director of the Qatar national oil company in return for a commission payable on any oil shipped under the renewed contract. The supply contract was renewed
F and the plaintiffs sought payment under the commission agreement. The defendants refused to pay and the plaintiffs brought an action in England to recover the amount of the commission. The defendants conceded that the commission agreement was governed by English law, but contended that the agreement was unenforceable in England because it had been performed in
G a friendly foreign state, Qatar, where its performance was illegal. The plaintiffs contended that the agreement was not illegal under the law of Qatar but merely contrary to public policy.

[53] Phillips J held that the public policy of a friendly foreign state could not of itself prevent the enforcement of a contract in England. Phillips J
H however held that an English court would not enforce a contract which was governed by English law but fell to be performed abroad if the contract related to a transaction which was contrary to English public policy founded on general principles of morality and the same public policy applied in the friendly foreign country where the contract was to be performed, which
I found support in *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd and Ors* [1999] 3 All ER 864, at 877, where Waller LJ (Mantell LJ concurring) held that where a contract, though unenforceable for reasons of

domestic public policy if performed in England, is to be performed abroad, it would be enforced by the English court unless it is also contrary to the domestic public policy of the country of performance.

[54] In his deliberation, Phillips J first summarised the law relating to English public policy.

> In *Norman v. Cole* [1800] 3 Esp 253, 170 ER 606 the plaintiff sought to recover moneys paid to a person who was to use his influence to procure a pardon for a man under sentence of death. The facts were set out in the report as follows. Tunstall was a man of good character before his conviction. The money was to be given to one Morland, a person of good connections and having access to persons of interest, for so using his interest by representing the case and character of Tunstall in favourable terms. Lord Eldon CJ dealt with the case in peremptory fashion. He said (3 Esp 253 at 253-254, 170 ER 606):
>
> > I cannot suffer this cause to proceed. I am of opinion, this action is not maintainable; where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money; the doing of an act of that description should proceed from pure motives, not from pecuniary ones. The money is not recoverable.
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> In *Parkinson v. College of Ambulance Ltd* [1925] 2 KB 1, [1924] All ER Rep 325 the secretary of a charity fraudulently represented to the plaintiff that he or the charity was in a position to undertake that the plaintiff would receive a knighthood if the plaintiff made a large donation to the funds of the charity. The plaintiff did not receive his title and sought to recover his money. Lush J said ([1925] 2 KB 1 at 13, [1924] All ER Rep 325 at 327-328):
>
> > … I cannot feel any doubt that a contract to guarantee or undertake that an honour will be conferred by the Sovereign if a certain contribution is made to a public charity, or if some other service is rendered, is against public policy, and, therefore, an unlawful contract to make. Apart from being derogatory to the dignity of the Sovereign who bestows the honour, it would produce, or might produce, most mischievous consequences. It would tend to induce the person who was to procure the title to use improper means to obtain it, because he had his own interests to consider. It would tend to make him conceal facts as to the fitness of the proposed recipient … The contract, in my opinion, is one that could not be sanctioned or recognised in a Court of Justice.
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> In *Montefiore v. Menday Motor Components Co Ltd* [1918] 2 KB 241, [1918-19] All ER Rep 1188 the plaintiff claimed under a contract which he alleged entitled him to commission for procuring from the government a loan to the defendants to be used in the manufacture of aircraft components. The issue was whether the commission was earned or not, but Shearman J

took the point that the agreement was contrary to public policy and not enforceable. He found the following facts ([1918] 2 KB 241 at 244, [1918-19] All ER Rep 1188 at 1190):

> … what was bargained for between the plaintiff and the defendants was the recommendation by the plaintiff of the merits of the defendants and the exercise of the influence of the plaintiff with servants of the Crown in order to induce an advance of public money to the defendants for the securing or the obtaining of Government contracts. The true consideration for the giving of the note was that the plaintiff should use his alleged position, and the value of his good word, in favour of the defendants in getting Government assistance in the form of money or contracts.

The judge then held ([1918] 2 KB 241 at 245, [1918-19] All ER Rep 1188 at 1190-1191):

> A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. In my judgment it is contrary to public policy that a person should be hired for money or valuable consideration when he has an access to persons of influence to use his position and interest to procure a benefit from the Government.

After citation of authority the judge went on ([1918] 2 KB 241 at 245-246, [1918-19] All ER Rep 1188 at 1191):

> It is well settled that in judging this question one has to look at the tendency of the acts contemplated by the contract to see whether they tend to be injurious to the public interest. In my judgment a contract of the kind has a most pernicious tendency. At a time when public money is being advanced to private firms for objects of national safety it would tend to corrupt the public service and to bring into existence a class of persons somewhat like those who in ancient times of corrupt politics were described as "carryers," men who undertook for money to get titles and honours for those who agreed to pay them for their influence …

[55] On the authority of those cases, Phillips J said that "it is possible to deduce the following principles underlying this head of public policy: (i) it is generally undesirable that a person in a position to use personal influence to obtain a benefit for another should make a financial charge for using such influence, particularly if his pecuniary interest will not be apparent; and (ii) it is undesirable for intermediaries to charge for using influence to obtain contracts or other benefits from persons in a public position."

[56] On the various heads of public policy that can invalidate contracts, Phillips J observed that in some cases it will be difficult to decide which head of public policy applies so as to render a contract unenforceable.

> In some cases it will be difficult to decide whether this head of public policy applies so as to render a contract unenforceable. In certain circumstances the employment of intermediaries to lobby for contracts or other benefits is a recognised and respectable practice. In the present case

the significant facts are as follows. (i) The influence to be exerted by Mr Yassin was on the controlling minister of a state-owned corporation; either directly or by influencing the managing director of the corporation. (ii) The influence was to be exerted in circumstances where it was essential that the person influenced should be unaware of Mr Yassin's pecuniary interest. (iii) The amounts at stake, both in terms of the value of the contract that it was hoped to obtain and the size of the commission to be earned by Mr Yassin, were enormous.

Had the agreement related to the procurement of a contract from a British government department or a state-owned industry, I am in no doubt that it would have been unenforceable by reason of English public policy. Is this policy a bar to enforcement having regard to the fact that performance of the relevant obligation was to take place not in England but in Qatar? This is no easy question. *Chitty on Contracts* (25th edn, 1983) p 561 has the following commentary:

> Where the contract is … valid by its foreign proper law, will it be unenforceable in England because it would be regarded as illegal or contrary to public policy under the rules governing domestic contracts? … where … the contract, though not involving criminality, is alleged to offend against one of the recognised heads of English public policy, great care should be exercised by the courts in determining whether the domestic policy demands the non-enforcement of a contract with substantial or even exclusive foreign elements which is valid under the system of law with which it has the closest connection. It cannot, however, be said that the courts have carefully considered this problem; instead they have usually applied the English heads of public policy and held such contracts unenforceable in England.

[57] Phillips J then went on to say that some heads of public policy are based on universal principles of morality and that when "a contract infringes such a rule of public policy the English court will not enforce it, whatever the proper law of the contract and wherever the place of performance":

Some heads of public policy are based on universal principles of morality. As Lord Halsbury LC said in *Re Missouri Steamship Co* [1889] 42 Ch D 321 at 336:

> Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it.

Where a contract infringes such a rule of public policy the English court will not enforce it, whatever the proper law of the contract and wherever the place of performance. Other principles of public policy may be based on considerations which are purely domestic. In such a case there would seem no good reason why they should be a bar to the enforcement of a contract to be performed abroad.

[58] But there should be no difficulty to place to which head of public policy applies to a contract for the sale of influence, for it is "a recognised head of English public policy that the court will not enforce a contract for the sale of influence, and particularly where the influence is to be used to obtain contracts or other benefits from persons in a public position: see *Norman v. Cole* [1800] 3 Esp 253, *Montefiore v. Menday Motor Components Ltd* [1918] 2 KB 241, [1918-19] All ER Rep 1188, *Lemenda (supra)* and *Tekron Resources v. Guinea Investment Co* [2003] EWHC 2577 (QB), [2004] 2 Lloyd's Rep 26" (*Marlwood Commercial Inc v. Kozeny and Others; Omega Group Holdings Ltd and Others v. Kozeny and Others* [2006] EWHC 872 (Comm) per Jonathan Hirst QC, sitting as a deputy judge of the High Court). The " … public policy … is that against the upholding of corrupt practices including influence peddling: see *Montefiore* and *Lemenda*" (*R v. V* [2008] EWHC 1531 (Comm) per David Steel J).

[59] But that latter head of public policy is only against the sale of influence and not against influence *per se*. That was distinguished in *Tekron*, where it was argued, *inter alia*, that officers of the claimant had stated that they had a 'special relationship' with the Government of Guinea; that under the terms of the representation agreement, the claimant had agreed to use its influence and or relationship with the Government and/or officials to obtain for the defendant an interest in bauxite concessions in Guinea; that such an agreement was illegal by the law of Guinea, namely the said art. 195 of the Guinean Criminal Code and/or that the agreement was void as being contrary to public policy under English law.

[60] Jack J held that the representation agreement involved no breach of art. 195 of the Guinean Criminal Code and was not contrary to English public policy. But more importantly, in answering the submission of the defence, Jack J underscored the important distinction between sale of influence and position of influence:

> Mr Smouha submitted that there were three reasons of public policy why agreements such as the representation agreement should be considered to be contrary to public policy under English law. The first was that, where an intermediary has a special personal relationship with an official, there is a risk that the official's decision will be affected. The second was that, where there is such a relationship, transparency may be lost. The third was that such an intermediary will inevitably be in a position of conflict because his desire to preserve his relationship will conflict with his duty to his client. I accept that these are valid considerations. They are not the only considerations. The question is whether they require that an intermediary who deals with an official, a minister, a government department and successfully builds a relationship of respect, of confidence, of trust, is to be barred from further dealings by the very fact of the relationship once it has been sufficiently established. There are, of course, advantages in officials dealing with persons whom they respect and can trust and in whom they have confidence.

> I should mention that Mr Smouha submitted that the ambit of the principle of public policy which he advanced was limited to matters involving public bodies and their officials. The justification was that with public bodies the public interest is engaged. The distinction between public and private bodies seems to me to be today less clear than perhaps once it was. In addition there may well today be a considerable public interest in the activities of substantial private bodies which provide public services.
>
> In my view it would be a substantial extension of the ambit of public policy as established in the cases if I were to accept Mr Smouha's submission. It would prevent the use of intermediaries in numerous situations where their use is now well-established in commercial situations, whether or not a 'public' body is involved. It would also bring in a serious element of uncertainty as to where the line was to be drawn. At what point would an intermediary cease to be able to negotiate fresh transactions with a particular third party? What happens when a position of "influence" develops during a negotiation? The previous authorities which I have considered were concerned with what I may call the sale of influence and only influence, and in circumstances in which it could be considered that the use of the influence would involve some impropriety. I should not accept Mr Smouha's submission.

[61] But the distinction between what is and what is not the sale of influence may not be obvious at times, as seem to have been the case in *David Wong Hon Leong v. Noorazman bin Adnan* [1995] 4 CLJ 155; [1995] 3 MLJ 283, and in *Ahmad Zaini Japar v. TL Offshore Sdn Bhd* [2002] 5 CLJ 201; [2002] 7 MLJ 604.

[62] In *Wong Hon Leong*, the appellant sought the assistance of the respondent, who said he knew the Menteri Besar of Selangor, to expedite the conversion and sub-division of his company's lands, for its development into a housing estate. The appellant agreed to pay a fee of RM268,888 ('the fee') for the respondent's services. Later, the appellant also agreed to pay an additional fee of RM100,000 for the respondent's assistance to obtain a right of way over an adjoining land. The respondent wrote a letter using the company's letterhead to the Menteri Besar, asking for assistance for an early approval of the application. The appellant paid RM100,000 to the respondent when he produced the letter with the handwritten word 'Disokong' addressed to the land administrator and signed by the Menteri Besar. Later, the land administrator informed the company that its application had been approved. The required right of way was eventually obtained. However, the appellant refused to pay the remaining fee of RM168,888 and the additional fee of RM100,000. The respondent applied for summary judgment. The appellant argued in his defence, *inter alia*, that: (i) there was no consideration for the alleged agreement; (ii) the respondent did nothing to earn his fee; and (iii) the agreement was void for illegality as the approval had already been granted at that point in time and the money was in fact a bribe. The judge rejected all the appellant's defences for not

amounting to *bona fide* triable issues, entered judgment for the sum of RM168,888, and granted unconditional leave to the appellant to defend in respect of the additional fee of RM100,000.

[63] On appeal to the Court of Appeal, the appellant reagitated three issues raised before the trial court, namely "(i) the plaintiff told the defendant that he knew the Menteri Besar of Selangor, some exco members and some Government officers and he was promised that he could expedite the conversion of the property. That would be illegal under ss. 24 and 25 of the Contracts Act 1950; (ii) he did nothing, therefore there was no consideration, and, (iii) they took this big sum of money and did nothing". On issues (ii) and (iii) which were related to the consideration, the Court of Appeal held:

> … the respondent did expend his exertions in securing the Menteri Besar's support for the company's application. The approval, much sought after by the appellant and the company, was obtained. In the words of counsel for the appellant when he addressed us on this point, 'the respondent delivered the goods'. In the light of this telling concession, it is an amazement that the appellant is able to submit that the respondent did nothing to earn his fee.
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> The actions of the respondent come well within the terms of s. 2(d) of the Contracts Act 1950 which reads as follows:
>
> > when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.
>
> The position of the respondent before us is, at the very least, not dissimilar from that of the successful plaintiff in *Lampleigh v. Brathwait* (1615) Hob 105, who, in order to obtain a pardon for the defendant, Brathwait, at the latter's request, exerted himself 'riding and journeying to and from London and Newmarket' at his own expense. Brathwait later promised to pay him £100 for his trouble, but failed to do so. Lampleigh sued in assumpsit and succeeded on the ground that his services had been rendered at the previous request. If Lampleigh could recover for his exertions, it is a little difficult to understand why the instant respondent should not.

[64] On illegality, it was submitted that the appellant was deceived into believing that approval would be granted when in fact it had already been granted and that the money paid to the respondent and what remained due were in fact a bribe to corruptly obtain support from the Menteri Besar and other state officials for the company's application. The Court of Appeal held that there was no deception, as "it was not a case where by means of a false representation, the respondent obtained a pecuniary advantage from the appellant or even the company", that the appellant "asked for help", the

respondent agreed "but asked for a fee", that the respondent "deliver the goods and received part payment", and that "the appellant is a man who is prepared to make unfounded allegations at the drop of a hat". As for the allegation of bribery, the Court of Appeal held that it was not substantiated. The appeal was dismissed without any consideration of s. 24 of the Act or a single case that pertained to illegality on the ground of public policy.

[65] In *Ahmad Zaini bin Japar*, the plaintiff was requested by the defendant to provide advisory services and assistance and to negotiate with several agencies for the purpose of procuring a contract for the defendant with Petronas Carigali. As consideration, the defendant agreed to pay to the plaintiff an amount equivalent to 1% of the contract value, subject to a limit of RM12 million. The plaintiff rendered the advisory services and succeeded in securing for the defendant a contract valued at RM2.1 billion. The defendant paid RM700,000 to the plaintiff for the services rendered. The plaintiff sued the defendant when the defendant failed to pay the outstanding sum. The plaintiff sought to enter summary judgment against the defendant who applied to strike out the plaintiff's claim. The Deputy Registrar entered summary judgment against the defendant and dismissed the defendant's application.

[66] On appeal to judge-in-chambers, the defendant argued, *inter alia*, that the plaintiff's activity was illegal as the plaintiff, being a third party, was able to influence the private and internal machinery of a national oil company in the award of a multi-million ringgit contract irrespective of more competitive and deserving bidders. But from the report of the grounds of judgment, it would appear that the illegality point on the ground of public policy was only taken up by the defendant after it was argued that the agreement did not exist, was *ultra vires*, and or was in contravention of company law or some other statute.

[67] At p. 669 of the report, the court revealed that "the defendant referred to the statement of claim and then submitted that the plaintiff purported to provide: (a) advisory service, and to render (b) assistance by using (c) his skill, (d) knowledge, and (e) endeavours, by holding or having discussions as well as negotiations with both the Government and non-governmental bodies, agencies and authorities in order to obtain the Petronas Carigali contract for the defendant. The defendant posed the questions "as to what kind of advisory service the plaintiff provided in order to enable the defendant to secure the Petronas Carigali contract" as to whether the plaintiff was a qualified and trained petroleum engineer, and as to whether the plaintiff was a trained petro-chemical expert or an oil and gas expert or a professional who provides such technical petroleum advice, to which questions the defendant answered that on the balance of probabilities the plaintiff could not provide such advice because the defendant, being an oil and gas company, had employees with that sort of expertise. In effect, the defendant contended that the expertise of the plaintiff could not be technical.

The defendant further argued that "Whoever he may be or whatever position he holds in society he must certainly have a strong influence with the Government and non-governmental bodies, agencies and/or authorities otherwise he would not be able to help the defendant to obtain the contract with Petronas Carigali, and this must be the nagging question that remains in the 'mind' of the defendant". To all that, the answer of the plaintiff was that he "expended his exertions in securing the Petronas Carigali contract for the defendant ... obtained the assistance of the treasury by marketing the defendant in order to successfully bid for the Petronas Carigali contract".

[68] However, the court held that illegality on the ground of public policy was not particularised and also not proved. The court ruled that the agreement "was perfectly within the domain of the Contracts Act 1950 and I do not propose to add anything more". On *Montefiore* which was specifically cited, the court held that "*Montefiore* was decided in 1915 while the case of *Wong Hon Leong* was decided in September 1995 against the background of our Contracts Act 1950 particularly ss. 2(d) and 2(e) thereto". Pertinently, the court remarked that the defendant in *Wong Hon Leong* had used his influence to secure the subdivision of the land.

> It was apparent that the defendant relied on the case of *Montefiore* to argue that it was illegal to use one's position or influence to procure a benefit or to secure a contract. But, with respect, there was not an iota of evidence to show that the plaintiff in the present case had used his position or influence in securing the Petronas Carigali contract for the defendant. *No doubt the respondent plaintiff in the case of Wong Hon Leong David v. Noorazman bin Adam had used his influence with the Menteri Besar to secure the approval for the sub-division of the land, but this fact was brought to the attention of the court in that case.* Indeed, the Court of Appeal … had alluded to this fact and His Lordship had employed the rigours of our Contracts Act 1950 to rule that the contract was good in law and His Lordship too had ruled that the contract was not illegal. I too, must follow the trail blazed … in that case and all the more reason for me to give effect to the contract between the parties in the present case because there was no evidence at all to show that the plaintiff in the present case had used his influence to secure the Petronas Carigali contract for the defendant. At any rate, in deciding the case of *Wong Hon Leong David v. Noorazman bin Adam*, the Court of Appeal was not bound to follow the decision of Shearman J in the case of *Montefiore*. I too am not bound to follow the decision in *Montefiore*. I am bound, however, to follow the decision of the Court of Appeal in *Wong Hon Leong David v. Noorazman bin Adam*. This was my judgment and I so hold accordingly. (emphasis added)

[69] But with the utmost of respect to both courts, it was entirely wrong to deal with the allegation of illegality by reference to s. 2 of the Act. A contract may be good under s. 2 of the Act but yet bad under s. 24 of the Act. It was entirely wrong in law to uphold an illegal contract from the aspect and on the basis of s. 2 of the Act. If it were to be decided under

s. 2 of the Act, then s. 24 of the Act and its purpose to render void the stated unlawful consideration and unlawful objects, would be rendered effete and meaningless, such as if had no use at all.

[70] As said, whenever the illegality of a contract is raised or become apparent, it is the duty of the court to take it up, by reference to s. 24 of the Act. In *Wong Hon Leong*, the allegation of illegality should have been considered by reference to s. 24(e) of the Act and the pertinent case law. But unfortunately, not a single authority on illegality on the ground of public policy was considered in *Wong Hon Leong*. Instead, only *Lampleigh*, an authority on past consideration in assumpsit that was decided just immediately after the Middle Ages, was relied on to rule against illegality. With respect, the Common Law of England has so developed that it would rule against the sort of service provided by *Lampleigh* for a fee.

[71] Since *Norman v. Cole* [1800] 3 Esp 253, "assumpsit will not lie to recover money deposited for the purpose of being paid to a person in his interest in soliciting a pardon for a person under a sentence of death". The action was brought to recover a sum of £30 which the plaintiff had deposited in the hands of the defendant upon terms that it would be applied to procure a pardon for one Tunstall who was under the sentence of death. On the case being opened, Lord Eldon expressed doubt as to whether the action was maintainable. On being asked to show upon what grounds they founded their right to recover, counsel for the plaintiff stated that Tunstall was a man of good character before his conviction and that the money was to be paid to one Morland, "a person with good connexions and access to persons of interest … so using his influence, by representing in favourable terms, the case and character of Tunstall". Lord Eldon held that the action was not maintainable:

> I cannot suffer this cause to proceed. I am of opinion this action is not maintainable; where a person interposes his interest and good office to procure a pardon, it ought to be done gratuitously, and not for money: the doing of an act of that description should proceed from pure motives, not from pecuniary ones. The money is not recoverable.

[72] Besides *Norman v. Cole*, Shearman J also relied on *Hopkins v. Prescott* [1847] 4 CB 578, 596, where Coltman J remarked that where a person undertakes for money to use his influence with the Commissioners of Taxes to procure for another party the right to sell stamps, & c., if the contract were not void by statute [5 & 6 Edw. 6, c. 16], it would be void at common law as contrary to public policy.

[73] By the first half of the 19th century, that is, well before *Montefiore*, there was already case law that pronounced that it was contrary to public policy that a person should be hired for money or valuable consideration, to use his position and interest to procure a benefit from the Government. Thereafter, that common law only became entrenched. In *Elliot v. Richardson*

A [1870] 5 LR 744, A and B were two shareholders of a company then being compulsorily wound up. B was also a creditor of the company. An agreement was entered into between them, by which A agreed to use his influence to obtain the postponement of a call then about to be made, and to support B's claim, and B, in consideration thereof agreed to pay all calls made on A's B shares. The agreement was held as contrary to the policy of the Winding-up Acts and therefore void. Only then came *Montefiore, Parkinson v. College of Ambulance* where it was held that a contract to procure an honour was unenforceable, and *Lemenda* where it was held that it is generally undesirable that a person in a position to use personal influence to obtain a benefit for C another should make a financial charge for using such influence, particularly if his pecuniary interest will not be apparent and that it is undesirable for intermediaries to charge for using influence to obtain contracts or other benefits from persons in a public position.

[74] Section 24 is a codification of the English Common Law. Therefore, D it is contrary to Malaysian public policy that a person be hired for money or valuable consideration, to use his position and interest to procure a benefit from the Government, as the sale of influence engenders corruption and undermines public confidence in the Government, which is inimical to public interest. It was preposterous to submit that "when the government E officials themselves have no qualms of the widespread practice of awarding contracts or projects to their cronies then surely this practice is acceptable in Malaysia. And hence such agreement to use a person's good contacts and or standing with certain government officials in order to procure contracts or projects cannot be against public policy in Malaysia" (see respondent's further written submission dated 15 October 2014 at para. 18).

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[75] We digress to underscore that *Lampleigh* was not an authority on public policy. In the corollary, the case that applied *Lampleigh* to uphold the alleged illegal contract, namely *Wong Hon Leong*, was decided *per incurium*, and which, with respect, we now expressly overrule, on the illegality point.

G **[76]** It is opportune to 'pigeon-hole' the service rendered by the respondent, and pronounce on the legality or otherwise of the letter of undertaking. The letter of undertaking stated (i) that the respondent, at the request of the appellant, had agreed "to render his services for the purpose of procuring and securing from the Government of Malaysia the award of the H project known as 'Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan' in favour of the Consortium called Suria Kalbu Sdn Bhd … in which the (appellant) has a 60% equity participation in the issued share capital", (ii) that through the (respondent's) "services aforesaid the Unit Perancang Ekonomi Jabatan Perdana Menteri by letter dated I 22 June 1998 has awarded in principle the project to the consortium", (iii) that "in consideration of the services aforesaid rendered by the (respondent) … Merong Mahawangsa Sdn Bhd … undertakes and agrees to

pay (the respondent) the sum of Ringgit Malaysia Twenty Million only (RM20,000,000) being the agreed remuneration payable on or before 3 November 1998" and (iv) that the undertaking "shall remain valid so long as the award for the project remains valid and subsisting and should the award be withdrawn and or terminated for any reasons whatsoever the aforesaid sum of RM20,000,000 or any part thereof shall be refunded without interest immediately".

[77] There could be no mistake about it, the RM20 million was intended as payment for service rendered by the respondent to secure the bridge project for the Consortium. But what sort of service was rendered by the respondent? In the instant case, the answer was provided by the respondent. The respondent pleaded that he "used his influence and good relationship with the Government of Malaysia to procure the original bridge project (SIG project) for the benefit and interest of the (first appellant)". In his amended statement of claim at 164-166 AR, the respondent particularised his close relationship with named Federal Ministers and his dealings with Federal Ministers with respect to the bridge project. But it was not in pleadings alone that influence peddling was admitted by the respondent. In his witness statement (see 564- 580AR), the respondent affirmed his pleaded facts and even provided further details of his influence and the manner in which he exerted his influence and convinced those Federal Ministers (in particular, see 569-571AR). "An agreement, the object of which is to use the influence with the Ministers of Government to obtain a favourable decision, is destructive of sound and good administration. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits. Such an agreement is contrary to public policy. It is immaterial, if the persons intended to be influenced are not amenable to such recommendations" (*Mulla Indian Contract and Specific Relief Acts* 13th edn, vol. 1 at 702-703). On the facts and on the face of it, it was so plain and obvious that the consideration was unlawful, and that the letter of undertaking was void. On that ground, the claim should have been dismissed.

[78] Given our finding that the letter of undertaking was contrary to public policy and therefore void and unenforceable, we need not deal with the issue of whether it was an award or contract that was withdrawn. But for completeness, let it not pass unsaid that the award and bridge project were intrinsically linked. There could not be one without the other. When the bridge project was withdrawn, which fact was not disputed, the award came to nought. When the bridge project was withdrawn, the award of the bridge project was automatically retracted. With respect, the reasoning that the 'award' was separable from the 'bridge project' ran counter to all intuitive as well as reasonable construction of the letter of undertaking. It was so self-evident that the RM20 million was the consideration for the 'service' rendered to procure the bridge project and not just a document. In that connection, we agree with the trial court's finding that when the project bridge was withdrawn, the RM20 million was not payable, but if paid, the

letter of undertaking provided that it should be returned. With respect, that was about the only finding we could agree with the courts below, for we could not fathom how the illegal agreement could be upheld by the trial court or how illegality could pass without a word of comment by the Court of Appeal.

[79] For the above reasons, we (on 14 May 2015, Mohamed Apandi Ali FCJ, as he then was, now AG, agreed with the draft of this judgment) unanimously answer the leave question, surely obviously, in the affirmative, allow this appeal with costs, affirm, for different reasons, the order of the trial court and set aside the orders of the Court of Appeal.

[80] We must add that this appeal concerns 'influence peddling' and we make no comment on the restitutionary rights of a party not *in pari delicto*, where the law is still in a flux state (see *"Reflections on the Law of Illegality"* by Lord Sumption dated 23 April 2012).